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No. 06-340

In the

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, et al.,

Petitioners,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2), which requires each federal agency to insure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat, overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE PERPETUATING THIS CIRCUIT SPLIT WOULD RESULT IN GREATLY DISPARATE PRACTICAL TREATMENT OF STATES' PERMITTING PROGRAMS WITHOUT CONGRESSIONAL OR AGENCY AUTHORIZATION 6

A. Future Authorizations Will Be Much More Difficult, If Not Impossible, for Ninth Circuit States to Receive 6

B. The Ninth Circuit Decision Encourages Courts to Withdraw Authority for Existing State Permitting Programs 9

II. THIS COURT SHOULD GRANT *CERTIORARI* TO DETERMINE WHETHER THE NINTH CIRCUIT'S "SUPERSTATUTE" TREATMENT OF THE ESA IS APPROPRIATE, AND, IF IT IS, WHAT RULES GOVERN THE IDENTIFICATION AND APPLICATION OF SUPERSTATUTES 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Alabama v. Bozeman, 533 U.S. 146 (2001) 13-14

Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003) 14

Christensen v. Harris County, 529 U.S. 576 (2000) 14

Defenders of Wildlife v. United States Environmental Protection Agency, 450 F.3d 394 (9th Cir. 2006) 3-5

Defenders of Wildlife v. United States Environmental Protection Agency, 420 F.3d 946 (9th Cir. 2005) ..... passim

Department of Transportation v. Public Citizen, 541 U.S. 752 (2004) 5

Food & Drug Admin. v. Brown & Williamson Tobacco, 529 U.S. 120 (2000) 15-16

Great-West Life & Annuity Ins. v. Knudson, 534 U.S. 204 (2002) 18

Lexecon v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) 14

Morales v. Trans World Airlines, 504 U.S. 374 (1992) 15

National Cable & Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327 (2002) 14-15

Plaut v. Spendthrift Farm, 514 U.S. 211 (1995) 11

Raleigh & Gaston R.R. Co. v. Reid, 80 U.S. (13 Wall.) 269 (1872) 14

Rapanos v. United States, __ U.S. __, 126 S. Ct. 2208 (2006) 1

TABLE OF AUTHORITIES—Continued

Page

Rivers v. Broadway Express, Inc.,
511 U.S. 298 (1994) 11

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,
531 U.S. 159 (2001) 1

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 5, 17-18

Townsend v. Little, 109 U.S. 504 (1883) 15

United States v. Fausto, 484 U.S. 439 (1988) 15

United States v. Riverside Bayview Homes,
474 U.S. 121 (1985) 1-2

Utah Junk Co. v. Porter, 328 U.S. 39 (1946) 18

Washington Toxics Coalition v. EPA,
413 F.3d 1024 (9th Cir. 2005) 16

Statutes

5 U.S.C. § 553(e) 11

16 U.S.C. § 1536(a)(2) 3, 13

33 U.S.C. § 1342(a) 2

§ 1342(b) 7, 13

§ 1342(c)(3) 12

§ 1344(e) 7

§ 1344(g) 8

§ 1345(c) 7-8

TABLE OF AUTHORITIES—Continued

Page

§ 1365(a)(2) 12

§ 1369(b)(1) 9, 11

Regulation

50 C.F.R. § 402.03 14

Rules

Sup. Ct. R. 37.2 1

37.2(a) 1

37.6 1

Miscellaneous

Statement of M. Reed Hopper in the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs: Federal Authority to Require Wetlands Dumping Permits, 2002 WL 31123945 (Sept. 19, 2002) 2

U.S. EPA, *NPDES Specific State Program Status*, *available at* http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific (last viewed Nov. 14, 2006) 6-7

U.S. EPA, *NPDES State and Tribal Program Authorization Status*, *available at* http://cfpub.epa.gov/npdes/statestribes/astatus.cfm (last viewed Nov. 14, 2006) 7

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, the Pacific Legal Foundation (PLF)[1] submits this brief amicus curiae in support of the National Association of Home Builder's petition for a writ of *certiorari*.

PLF is the largest and most experienced nonprofit, public-interest law foundation of its kind in the United States, incorporated for the purpose of litigating in the public interest. For more than 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property free of unnecessarily intrusive government interference, and has advocated in favor of maintaining a reasonable balance between government efforts to protect the environment and the other necessary and proper functions of government and of free society. PLF supports the concept of limited government, the maintenance of an appropriate balance between federal and state power, and the principle that the environment must be protected in a manner that is consistent with the other needs of American society.

PLF attorneys have on several occasions appeared before this Court to present interpretations of the Clean Water Act. Most recently, PLF attorneys represented petitioner John Rapanos before this Court in *Rapanos v. United States*, __ U.S. __, 126 S. Ct. 2208 (2006). PLF also participated as amicus curiae in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), and *United States v. Riverside Bayview Homes*, 474 U.S. 121

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

(1985). PLF attorneys also offered nonpartisan testimony before Congress explicating the scope of federal jurisdiction under the Clean Water Act. *See Statement of M. Reed Hopper in the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs: Federal Authority to Require Wetlands Dumping Permits*, 2002 WL 31123945 (Sept. 19, 2002). PLF believes that its experience in this area will provide an additional, valuable and informed viewpoint to the Court's consideration of this case.

SUMMARY OF THE ARGUMENT

At issue in this case is the question of whether the Environmental Protection Agency (EPA), is required by the Endangered Species Act (ESA) to consider the potential impact on endangered and threatened species and their habitats that might arise from a decision to transfer water pollution-permitting authority to state governments under the Clean Water Act.

Writing for herself and Judge Reinhardt, Judge Berzon of the Ninth Circuit Court of Appeals concluded that the EPA must, under the ESA, consider the potential impact on endangered and threatened species and their habitats that might arise from a decision to transfer water pollution-permitting authority to state governments pursuant to the National Pollution Discharge Elimination System (or pollution-permitting program) established in the Clean Water Act. *See Defenders of Wildlife v. United States Environmental Protection Agency*, 420 F.3d 946, 949 (9th Cir. 2005) (*Defenders I*). The court reached this conclusion despite the fact that the Clean Water Act, the statute that establishes both the pollution-permitting regime and the transfer of authority over this regime to the states, specifies nine detailed criteria by which the administrator of the EPA "shall approve" authority transfers. *Id.* at 950 (citing 33 U.S.C. § 1342(a)). The majority

concluded that the exclusive nature of the Clean Water Act's authorization procedure was irrelevant, because application of the ESA's species-protection provisions depends *solely* upon the text of the ESA itself: "the nexus to any impact on listed species, the nature of the obligation to 'insure' against jeopardizing listed species, and the actions covered." *Id.* at 962 (quoting 16 U.S.C. § 1536(a)(2) (ESA § 7(a)(2))).

Senior Judge Thompson dissented from the panel majority's opinion. He asserted that where the rules for passing permitting authority under the Clean Water Act to the states are in the Clean Water Act itself, then analysis of the exclusivity of those rules should begin with the rules themselves and with the Clean Water Act—not with the ESA—and should be found exclusive unless they left with EPA the discretion to add additional criteria. *Id.* at 980.

Similarly, six judges of the Ninth Circuit dissented from the decision not to reconsider the panel's opinion *en banc*. That dissent considers five reasons why the panel's majority opinion must be considered problematic, and the subject matter vitally important. *Defenders of Wildlife v. United States Environmental Protection Agency*, 450 F.3d 394, 396 (9th Cir. 2006) (*Defenders II*) (dissent from denial of rehearing en banc).

One of the five problems addressed by the rehearing dissent as well as by the panel majority and dissent was that the panel majority's decision either creates or perpetuates a circuit split,[2] *see Defenders II*, 450 F.3d at 400, with the Ninth Circuit

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[2] The Fifth and D.C. Circuits have squarely reached the result opposite to the Ninth Circuit on this issue. *See Defenders I*, 420 F.3d at 970. Both the dissent from rehearing *en banc* and the United States in its petition for *certiorari* in this matter have reviewed at length the error of the court below in claiming to be joining, rather

(continued...)

(and possibly others) now requiring that endangered-species jeopardy consultation with the EPA precede authorization under the Clean Water Act. *See Defenders I*, 420 F.3d at 967. Moreover, the panel majority's decision makes clear that receiving authorization under its regime will be much harder, if possible at all. *Id.* at 977. Because every state in the Ninth Circuit lacks *some* Clean Water Act permitting authority, *see infra* at section I.A, the result of this circuit split is concrete and pervasive: states in (at least) the Ninth Circuit will find themselves uniquely legally impaired—if not actually precluded—from access to an important opportunity offered equally to all states by Congress. *See id.*

Meanwhile, the opinion of the court below evinces a willingness to withdraw already-granted permitting authority despite the serious costs and inefficiencies associated with such withdrawals. *Id.* at 978. This, along with its conclusion that 7(a)(2) must apply—and always has applied—to Clean Water Act permit-authority transfers, and its disregard of the plain text of the Clean Water Act, raises the very real possibility that all Ninth Circuit states currently administering Clean Water Act permitting programs might find their authorizations withdrawn for lack of ESA section 7(a)(2) review. The severe dislocations that would arise from such wholesale withdrawals, and the real possibility of that result, heighten the importance of this Court's consideration of the decision. *See infra*, Section I.B.

Another of the five problems with the decision below noted by the rehearing denial dissent is that "the majority treats the ESA as superior to all other laws, thereby nullifying a crucial ESA regulation and forcing agencies to violate

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[2] (...continued)
than initiating, a circuit split. *See Defenders II*, 450 F.3d at 400-01; Petition of the United States for a Writ of *Certiorari*, Docket No. 06-549, at 20-21 n.7.

their governing statutes."[3] *Defenders II*, 450 F.3d at 396. This treatment of the ESA as a superstatute—a statute that, *sub silentio*, trumps and implicitly repeals explicit and specific provisions of separate federal enactments (in this instance, the Clean Water Act), stands in contravention of all principles of statutory interpretation enunciated by this Court. The Ninth Circuit bases this interpretation on *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173-93 (1978). Because this superstatute treatment of the ESA (or of any statute) is a novelty in American jurisprudence; because acceptance of the superstatute doctrine would create difficulties in interpretation and application of other statutory regimes not accorded similar treatment; and because both the panel majority's justification for its superstatute treatment of the ESA and the justification for rejecting that position both arise from various pronouncements of this Court, it is of the highest importance that this Court address directly the question of whether the ESA really is to be treated as a superstatute, and what such treatment, if appropriate, should entail. *See infra*, Section II.

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[3] The other flaws in the panel's opinion discussed by the dissent from the refusal of the circuit to rehear the case *en banc* (but not addressed in this brief) were these: (1) the panel erred in finding EPA's decisionmaking process meaningfully internally inconsistent; (2) the panel misinterpreted the way the ESA is meant to operate; and (3) the panel's opinion contravened this Court's holding in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). *See Defenders II*, 450 F.3d at 396-99.

ARGUMENT

I

THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE PERPETUATING THIS CIRCUIT SPLIT WOULD RESULT IN GREATLY DISPARATE PRACTICAL TREATMENT OF STATES' PERMITTING PROGRAMS WITHOUT CONGRESSIONAL OR AGENCY AUTHORIZATION

This circuit split results not merely in simultaneous, contrary interpretations of federal law, but also in serious on-the-ground effects. States in the Ninth Circuit will find Clean Water Act permitting authorizations substantially harder to obtain (if not beyond reach) than states in other Circuits. Moreover, Ninth Circuit states face the very real possibility of seeing current authorizations withdrawn by the courts, at great inefficiency and expense. All of this will occur without any indication by Congress or any authorized regulating agency that disparate treatment is appropriate.

A. Future Authorizations Will Be Much More Difficult, If Not Impossible, for Ninth Circuit States to Receive

As the court below recognized, Arizona was the forty-fifth state to receive basic pollution-permitting authority. *See Defenders I*, 420 F.3d at 950. Now that Arizona's permitting authority has been judicially withdrawn, three states in the Ninth Circuit—Arizona, Alaska, and Idaho—lack that basic permitting authority. *See id.* at 978-81; U.S. EPA, *NPDES Specific State Program Status*, *available at* http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific (last viewed Nov. 14, 2006) ("*NPDES State Status*"). Alaska currently is seeking basic pollution-permitting

authority. *See* Petition of the United States for a Writ of *Certiorari*, Docket No. 06-549, at 25.

Because of the Ninth Circuit's decision, these three states, unlike the 44 states that have already received basic permitting authority, will be required to ensure that transfer of permitting authority to them will result in as much protection to endangered and threatened species as would be provided by the ESA section 7 consultation that would be required absent the transfer of authority. *See Defenders I*, 420 F.3d at 977.

But this decision affects more than these three states: it will necessarily affect every state in the Ninth Circuit. The National Pollution Discharge Elimination System program authorized by the Clean Water Act includes more than simply the basic program for which 44 states have already received authorization. It also includes opportunities for states to obtain authorization to administer the program with regard to federal facilities, general permitting (for discharge of dredge or fill material), pretreatment programs, and biosolids (sludge). *See, e.g.*, U.S. EPA, *NPDES State and Tribal Program Authorization Status*, *available at* http://cfpub.epa.gov/npdes/statestribes/astatus.cfm (last viewed Nov. 14, 2006); 33 U.S.C. §§ 1344(e) ("general permits" for discharge of dredge and fill material); 1345(c) (sludge/biosolids). Every state in the Ninth Circuit lacks at least one of these authorizations. *See NPDES State Status*. Thus each state in the Ninth Circuit will face the heightened obligations.[4]

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[4] The court below does not mention the existence of these other permitting authority opportunities, and therefore does not explicitly include them in its decision requiring that ESA section 7(a)(2) consultation precede transfer of NDPES authority under the Clean Water Act. But the decision has exactly that effect, as the permitting authority requirements for these other NDPES programs are virtually identical to those of the basic permitting authority or incorporate those requirements. *See, e.g.*, 33 U.S.C. §§ 1342(b)

(continued...)

The court below recognized the relative permitting-authority disability worked by its decision:

> In the abstract, voluntary compliance by state agencies willing to follow FWS recommendations to the same extent as would the EPA *might* substitute for section 7 coverage. The EPA, however, could not so conclude without first analyzing the likelihood that *all* relevant Arizona agencies can and would live up to the Game and Fish Department's promises, as well as considering the effectiveness of federal oversight if Arizona agencies fail to live up to any such promises.

Defenders I, 420 F.3d at 977.

> It is *possible* that some combination of state and federal protections for listed species and state agency cooperation with the federal Memorandum of Agreement might sufficiently replace the benefits of section 7 consultation so that no harm to listed species would be "reasonably certain to occur" as a result of losing section 7 consultation.

Id. (emphasis added).

In these passages the court below recognized that adding a section 7 endangered-species review to the Clean Water Act permit-authorization process would be quite onerous, and could preclude permit-authority transfers entirely.

In this scenario, no state in the Ninth Circuit may participate in the Clean Water Act permit-authorization transfer process. By amending the statute, *Congress* could close the

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[4] (...continued)
(basic permitting-authority transfer rules); 1344(g) ("general" permitting-authority transfer rules); 1345(c) (incorporating section 1342 requirements for biosolids/sludge).

window of opportunity for states to gain permitting authority, or increase the restrictions appurtenant to the transfer process while grandfathering in under the old rules states to which authority had already been transferred. This is not the case here, however. Congress obviously intends that all states should continue to face identical procedures when applying for permitting authority; it has made no alterations to the blanket rules for authorization transfer. Because of the current circuit split, this Court should grant *certiorari* to establishing a single, national interpretation of this legal question.

B. The Ninth Circuit Decision Encourages Courts to Withdraw Authority for Existing State Permitting Programs

The logic of the Ninth Circuit's opinion raises the possibility that these states will soon find their *existing*, already authorized permitting programs invalidated, and permitting authority transferred back to the federal government.

In the case below the court found subject-matter jurisdiction to review the "Biological Opinion completed by [the U.S. Fish & Wildlife Service] that informs th[e] decision" of the Administrator of the EPA to grant Arizona's transfer request. Jurisdiction arose, it claimed, because "'any interested person' may seek judicial *review* of the EPA Administrator's pollution permitting or state transfer decisions in the circuit court in which the person resides, so long as that circuit is directly affected by the Administrator's action." *Defenders I*, 420 F.3d at 955 (quoting 33 U.S.C. § 1369(b)(1)).

Having found subject matter jurisdiction on this basis, the court below then invalidated Arizona's existing, authorized permitting program. In immediately terminating the program, the court below made plain that it found the necessity of section 7 review of permitting-authority transfers to override the costs that would flow from dismantling extant state permitting programs. It first noted that

> Arizona has undoubtedly expended significant funds to obtain and implement pollution permitting authority and granted a significant number of permits pursuant to this authority. We cannot reverse the expenditure of those funds nor the issuance of those permits. We further recognize the administrative difficulties in transferring a program like pollution permitting from Arizona back to the EPA and very possibly back to Arizona again.

Id. at 978 (footnote omitted). It then concluded, however, that

> [o]ther factors [] weigh heavily in favor of vacating the EPA's approval of Arizona's transfer application. . . . Arizona annually issues tens of thousands of pollution permits pursuant to the EPA's action. We have concluded that, absent section 7 coverage, we have no strong assurances that these permits will not allow development projects that are likely to jeopardize listed species or adversely modify their habitat. The purpose of the [ESA]—to conserve endangered and threatened species rather than allow them to go extinct—renders the risk of harm to listed species too great. . . . Our concern with the risk of extinction comports with our understanding of the [ESA's] "institutionalized caution mandate." Without greater assurances that harm to listed species would not occur, our "institutionalized caution" makes us unwilling on the present record to order any remedy other than vacation of the EPA's approval of Arizona's transfer application.

Id. at 978-79 (internal citations omitted).

Thus, the only distinction between the Ninth Circuit's decision to vacate Arizona's permitting authority and close down its permitting program, and a decision to similarly dismantle authorizations granted to other Ninth Circuit states,

lies in the fact that those authorizations are of many years' standing.[5] Section 1369(b)(1), upon which the court relied here for subject-matter jurisdiction, does insist that suits for review of a determination made "as to a State permit program" be filed "within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). Submission of a petition to the Administrator of the EPA,[6] however, praying invalidation of long-granted authorizations and long-established programs on the grounds that the initial transfers occurred without section 7 review would require a "determination as to a State permit program" which could be read to trigger the same subject-matter jurisdiction, and the same conclusion, that the Ninth Circuit found here.

While states would object to this means of attack upon long-standing state permitting programs, the objections would arise from, and require, treating the Clean Water Act and its provisions as the sole (or even primary) determinant of

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[5] The Ninth Circuit's decision that the permitting-transfer decisions require a section 7 endangered-species consultation and no-jeopardy determination in order for them to be valid represents a holding that section 7 consultations and determinations have *always* been necessary. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 216 (1995) ("'A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" (quoting *Rivers v. Broadway Express, Inc.*, 511 U.S. 298, 312-13 (1994))).

[6] *See* 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

transfer-authorization requirements.[7] The Ninth Circuit's demonstrated rejection of this course, *see Defenders I*, 420 F.3d at 969, along with its privileged treatment of the ESA, *see id.* at 963-69 and *infra* at Section II, and its expansive employment of the precautionary principle, *see Defenders I*, 420 F.3d at 979-80, all strongly suggest that maintenance of the opinion below will result in successful challenges to all Ninth Circuit state permitting programs that were authorized without section 7 endangered- and threatened-species review.

Because this very real possibility would have profound effects on the Clean Water Act-permitting programs of every state in the Ninth Circuit that currently enjoys authorization, it heightens still further the practical effects of this circuit split, and increases the importance of this Court's decision to grant *certiorari*.

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[7] The strongest objection to this ground of attack would be that the Clean Water Act permits citizen suits only "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty *under this chapter* which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2) (emphasis added). *See also* 33 U.S.C. § 1342(c)(3) ("Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program."). These provisions would seem to limit the Administrator's obligations and authorities with regard to state permitting programs to those described in the Clean Water Act itself, and to render actions based on section 7(a)(2) beyond the scope of these provisions. But these arguments applied equally to the case at bar, and were rejected.

II

THIS COURT SHOULD GRANT *CERTIORARI* TO DETERMINE WHETHER THE NINTH CIRCUIT'S "SUPERSTATUTE" TREATMENT OF THE ESA IS APPROPRIATE, AND, IF IT IS, WHAT RULES GOVERN THE IDENTIFICATION AND APPLICATION OF SUPERSTATUTES

The Clean Water Act provides that "a state may apply to the EPA to administer the federal pollution permitting program regarding waters within its borders." 33 U.S.C. § 1342(b). The EPA Administrator *must* determine whether the state has met *nine specified* criteria and '*shall* approve' state applications that meet those criteria." *Defenders I*, 420 F.3d at 950 (quoting 33 U.S.C. § 1342(b)) (emphasis added).

The ESA requires that with regard to "'any action authorized, funded, or carried out by [a federal] agency' . . . [e]ach agency must 'insure' that such actions are 'not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.'" *Id.* at 950-51 (quoting 16 U.S.C. § 1536(a)(2)).

These two separate federal statutory provisions are in conflict. The former, in the statute that itself establishes the national pollution standards and sets up the state permitting program authorization process, sets up an exclusive list of nine tests for the transfer of state permitting authority, and the transfer *shall* occur when *those nine* (and only those nine) tests are met.[8] The latter creates a cross-cutting obligation for *all*

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[8] The relevant rules of statutory construction conjoin to require that the nine tests for permitting-authority transfer be read as mandatory and exclusive. *See, e.g., Alabama v. Bozeman*, 533 U.S. 146, 153 (continued...)

agencies of the federal government to insure that their actions are not likely to jeopardize endangered or threatened species. If the ESA obligation were appended to the permitting-authorization process, it would add a tenth test. Because an agency cannot, at the same time, both grant authorization with exclusive regard to nine criteria *and also* add a tenth criteria, the agency cannot follow both statutory commands at the same time. This represents a direct conflict.

The regulations guiding the EPA in dealing with this conflict instruct that "[s]ection 7 and the requirements of this Part [regulating interagency cooperation in conducting section 7 consultations] apply to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added). This regulation represents a resolution of the statutory-text conflict that accords neatly and appropriately with the relevant canons of statutory construction.

This Court has long and consistently instructed that "specific statutory language should control more general language when there is a conflict between the two." *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534

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[8] (...continued)
(2001) ("'The word "shall" is ordinarily the language of command.'" (citation omitted)); *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[I]nstruction[s that] come[] in terms of the mandatory 'shall' . . . normally create[] an obligation impervious to judicial discretion."); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("[T]he canon *expressio unius est exclusio alterius* . . . has force . . . when the items expressed ['in a listing or grouping'] are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."); *Christensen v. Harris County*, 529 U.S. 576, 583 (2000) (" 'When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.' ") (quoting *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1872)).

U.S. 327, 335 (2002); *see also Food & Drug Admin. v. Brown & Williamson Tobacco*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."[9]) (*Brown & Williamson*); *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Townsend v. Little*, 109 U.S. 504, 512 (1883) (ruling "[a]ccording to the well-settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general"). The regulation enshrines this teaching; the general ESA no-jeopardy provisions apply to all acts—unless, as here, a statute such as the Clean Water Act has given a specific, mandatory and exclusive instruction. In the latter case, the general ESA provision yields.

Second, this Court has reaffirmed the "principle of statutory construction . . . that a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two." *United States v. Fausto*, 484 U.S. 439, 452-53 (1988). Because section 7(a)(2) makes no explicit mention of, much less claim to repeal, earlier-enacted mandatory and exclusive orders, the regulation's exemption of such orders from the reach of section 7(a)(2) accords with this canon.

Finally, this Court has instructed that courts "must be guided to a degree by common sense as to the manner in which Congress is likely to" treat a delegation of power of great "economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133. This

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[9] Here, Congress spoke more specifically in the Clean Water Act, but subsequently in the ESA. *See Defenders I*, 420 F.3d at 950.

"common sense" rule arises from the recognition that Congress is unlikely to have taken profound action through "subtle device[s]." *Id.* at 160. The regulation, by limiting the scope of section 7(a)(2) review to discretionary agency actions, affirms the common-sense conclusion that Congress did not intend, in the second subsection of the seventh section of an enactment, and by implication, to revoke the mandatory and exclusive nature of every mandatory and exclusive statutory command it had uttered to all arms of the executive power of the United States government.

The Ninth Circuit waves away the ESA conflict by claiming that it does not exist, asserting that the EPA must apply the nine tests of the Clean Water Act *and* section 7(a)(2) of the ESA because "'an agency cannot escape its obligation to comply with the [ESA] merely because it is bound to comply with another statute that has consistent, complementary objectives.'" *Defenders I*, 420 F.3d at 967 (quoting *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005)). But this counterfactual assertion—that the provisions are complementary rather than conflicting—does not actually ameliorate the conflict.

The Ninth Circuit's refusal to consider the content or nature of the Clean Water Act's permitting-authority transfer provisions,[10] has the effect of declaring the ESA a winner by

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[10] The court below asserts that

> [a]uthority over the loss of section 7(a)(2) consultation could be grounded in either the Clean Water Act or the Endangered Species Act. The former option is not presented here, so we focus on whether the obligation in section 7(a)(2) to "insure" against jeopardizing listed species empowers the EPA to make decisions to preserve listed species and their habitat even if the Clean Water Act does not so specify. If so, then the EPA has the authority—indeed, because section 7(a)(2) speaks in mandatory terms, the duty—to deny a pollution permitting

(continued...)

default. If ESA language is mandatory, then it applies—without any need even to consider what would necessarily be conflicting language if the statutes were treated with equal dignity.

This elevation of the ESA to the rank of superstatute by the court cannot be squared with the canons of statutory construction long enunciated by this Court and relied upon to bring coherence and consistency to the American jurisprudential system.

To the extent that the Ninth Circuit provides any justification for its superstatutory treatment of the ESA, it relies almost exclusively on strong language in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, buttressed by conclusions it reaches from a review of the legislative history of the act and later amendments.

In *Hill* this Court wrote that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Hill*, 437 U.S. at 193, *quoted at Defenders I*, 420 F.3d at 964. It based this conclusion on an analysis of the legislative history of the Act. Because earlier versions of the ESA explicitly cabined the sweep of its instructions to acts " 'insofar as . . . practicable and consistent with [an agency's] primarily purpose,' " while the enacted version did not, this Court concluded that "[t]he 'pointed omission' of such qualifications amounted to an 'explicit congressional decision to require agencies to afford *first priority* to the declared national policy of saving endangered

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[10] (...continued)
transfer application that meets Clean Water Act standards but would jeopardize protected species.

Defenders I, 420 F.3d at 963 (footnote omitted). Notably, the court fails even to consider the text of the Clean Water Act, much less to contemplate whether *its* provisions might also be mandatory, thus creating the conflict explicated above.

species.'" *Defenders I*, 420 F.3d at 965 (quoting *Hill*, 437 U.S. at 181, 185). With this interpretive framework in place, this Court concluded that

> [o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words *affirmatively command* all federal agencies "to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species . . . ." This language admits of no exception.

437 U.S. at 173, *quoted at Defenders I*, 420 F.3d at 964 (all emphases in *Defenders*, all but first in *Hill*).

Yet this Court has repeatedly held that in construing definite procedural provisions and specific statutory language, reconciliation and application of textual provisions themselves should guide action, with only the chariest recourse to "vague notions of a statute's basic purpose," *Great-West Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 220 (2002), or "argumentative qualifications from broad, unexpressed claims of policy." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946).

The result of this interpretive method is to make the ESA wholly superior to all other laws, to *sub silentio* amend thousands of statutory obligations of various federal agencies, and to establish an unworkable rule of statutory interpretation. For unless the ESA is somehow to be deemed the *only* statute that merits this "superstatute" status, then federal agencies will rapidly find themselves not only obliged to subordinate complete statutory directives to silently incorporated ESA considerations, but also to treat as *primus inter pares* other statutes that different courts of their own initiative honor with similar superstatute status. The Ninth Circuit's opinion, because it failed to recognize the conflict between the Clean

Water Act and the ESA in this matter, failed also to grapple with, much less provide solutions to, these doctrinal difficulties patent in the emergence of a superstatute.

Thus is presented, in stark relief, the importance of this Court's grant of *certiorari* in this matter. This Court's long-standing canons of statutory construction require that all statutory text be given equal authority. They further instruct courts that specific, mandatory and exclusive provisions (here, of the Clean Water Act) control over general and broad provisions (here, of section 7(a)(2) of the ESA). Finally, this Court teaches that significant constitutional novelty, like the enactment of a superstatute, should not be found to have arisen from "subtle devices." Bypassing all this jurisprudence, the Ninth Circuit relies solely on this Court's words in *Hill*—providing, according to the court below, support for its proposition that the ESA is a superstatute whose superiority leaves it ungoverned by the Court's statutory-construction canons and equal-treatment assumptions.

CONCLUSION

The Petition for Writ of *Certiorari* should be granted.

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Respectfully submitted,

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